Supreme Court, U.S.
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No. 97-761

In the

Supreme Court of the United States

October Term, 1997

ELIZABETH WEAVER AND ROY VARNER,

Petitioners,

v.

HARVEY WOOD, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

REPLY BRIEF FOR PETITIONERS

KENNETH A. COHEN
CERISE H. LIM-EPSTEIN
Goodwin, Procter & Hoar, LLP
Exchange Place
Boston, Massachusetts 02109
(617) 570-1000

LAURENCE H. TRIBE
Counsel of Record
1575 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

PETER J. RUBIN
2027 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 265-5385

Counsel for Petitioners

December 12, 1997

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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ARGUMENT

Respondents devote most of their brief in opposition to mistaken procedural claims and misguided prudential arguments. There is little to these arguments besides respondents' own surprisingly overheated rhetoric. To the extent respondents do engage petitioners' argument on the merits, they refuse to acknowledge the change in Massachusetts law wrought by the opinion of the Supreme Judicial Court ("S.J.C.") below, and the devastating consequences that it will have on the method of governance chosen for Christian Science by Mrs. Eddy.

Nothing in the brief in opposition undermines petitioners' argument that review is warranted here: Massachusetts, unlike other states, now would deny standing to petitioners solely on the basis of the form taken by their rights to participate in the governance of their church. The rule articulated by the S.J.C., which violates petitioners' rights under the Religion Clauses as well as the Due Process and Equal Protection Clauses, can be corrected only by this Court. And, because this decision of Massachusetts' highest court will apply to the governing documents of The Mother Church in litigation wherever conducted, the decision below is of profound importance to the entire Christian Science denomination and thus to the nation.

A. Petitioners' Federal Claims Were Properly Raised Below

Respondents rely primarily on what they describe as a "procedural default" by petitioners below. Opp. 18. They claim that the federal issues here were not properly raised below and that this Court consequently lacks jurisdiction under 28 U.S.C. § 1257.

Respondents' contention is flatly incorrect. In this case, petitioners claimed before the S.J.C. that failure to permit this suit to go forward would violate both Religion Clauses of the First Amendment. Respondents characterize petitioners' arguments below as "little more than a rhetorical flourish," Opp. 16, but this self-serving assessment has no significance. In their brief before the S.J.C. petitioners in fact argued:

> Without access to the relief provided by the founder and "Leader" of the Church, and now sought by the [petitioners], it will be they, not the [respondent] directors, officers and trustees, who will be deprived of the First Amendment right of free exercise of their religion.

Petitioners' S.J.C. Br. at 49. Petitioners also argued in reliance on *Serbian Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 734 (1976), that

> to prohibit involvement by the Superior Court in this matter will itself, by mandating judicial inaction, "create far more serious problems under the Establishment Clause."

Id.

Under 28 U.S.C. § 1257, "a federal claim cannot be considered by the Court unless it has been *either* raised in the state court *or* considered and resolved by the state court." Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, § 3.17 at 122 (7th ed. 1993) (hereinafter cited as "Stern & Gressman"). This Court may consider any federal claim that was "properly presented to[] the state court that rendered the decision we have been asked to review." *Adams* v. *Robertson*, 117 S.Ct. 1028, 1029 (1997).

Here, petitioners' federal claims under the Free Exercise and Establishment Clauses were properly before the S.J.C. Although those claims had not been pressed in the trial court, the rule in the S.J.C. is that the party that *prevailed* in the trial court may rely on *any* ground in support of affirmance, "even relying on a principle of law not argued below." *Aetna Casualty & Surety Co.* v. *Continental Casualty Co.*, 604 N.E.2d 30, 33 (Mass. 1992). Thus although, as petitioners made clear in the very first sentence of their Statement of the Case, the S.J.C. decision was "couched as merely a denial of standing under state law," Pet. 2, the preservation of petitioners' federal claims for review by this Court is beyond doubt. "When the highest state court is silent on a federal question before us," the "presumption" that the issue was not properly presented is defeated by a "demonstrat[ion] that the state court had 'a fair opportunity to address the federal question that is sought to be presented here.'" *Adams*, 117 S.Ct. at 1029 (citation omitted).

Petitioners do make *arguments* in support of their claims that were not contained in their brief before the S.J.C. But as respondents' counsel are surely aware — they include the co-author of the leading book on Supreme Court practice — it is well settled that in this Court "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992); see also *Leebron* v. *National Railroad Passenger Corporation*, 513 U.S. 374, 378-380 (1995).

Petitioners present four arguments for reversal on the merits before this Court. Two of them *are the very arguments quoted above* made in petitioners' brief before the S.J.C. See Pet. 21-23 (argument sub-points b and c). The two others are based on the discrimination *among* religions wrought — unexpectedly — by the remarkable line implicitly drawn by the S.J.C. in the opinion from which petitioners now seek review. One of these arguments is made under the Establishment Clause. See Pet. 23-24 (argument sub-point d). This is plainly just a new argument in support of the Establishment Clause claim that petitioners had clearly presented to the S.J.C. The other, that made under *M.L.B.* v. *S.L.J.*, 117 S.Ct. 555 (1996), is that the decision below unconstitutionally burdens petitioners' Free Exercise rights by denying them access to court solely on the basis of the way their religion is organized. See Pet. 20-21 (argument sub-point a).

Because of its context — it involves denial of access to courts — this particular type of Free Exercise violation at the same time runs afoul of the Due Process and Equal Protection Clauses, and petitioners do rely here on those provisions. But the constitutional violation is dependent on interference with an "associational right[]," 117 S.Ct. at 564, in this case the Free Exercise right to practice one's religion according to its Founder's chosen means of structuring members' participation in church governance.

This argument — which, this Court has said, defies "easy slogans or pigeonhole analysis," 117 S.Ct. at 566 (internal quotation marks and citation omitted) — amounts only to a new argument in support of petitioners' Free Exercise claim. But even if it were construed as a new *claim* — one under the Due Process and Equal Protection Clauses — it would *still* be properly before this Court. For "this Court has held federal claims to have been adequately presented

even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation." *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 85-86 n. 9 (1980).

In such cases, petitioners are required only to make their argument to the state court at the first available moment. In this case, the argument based on discrimination among religions is a response to the surprising decision of the S.J.C. to treat adherents of different religions differently for standing purposes depending upon nothing more than the form of their rights to participate in their church's governance, regardless of the relative significance of those rights. See Pet. 19. As respondents acknowledge, petitioners made their discrimination argument before the state court in the petition for rehearing, Opp. 17, the first possible opportunity. This suffices to bring that argument, even if it is viewed as a new "claim", properly before this Court. See Stern & Gressman § 3.17 at 129.

Respondents do contend that "petitioners can claim no surprise." Opp. 17. But the only thing that respondents say should not have surprised petitioners was a ruling on "the standing issue." Opp. 17. Respondents do *not* — and could not — contend that the line in effect drawn by the S.J.C. among religions was something that petitioners could have anticipated before the S.J.C.'s decision issued. (They *do* argue that no such line was even implicitly drawn, but about this they are patently incorrect. See *infra* at 4-6.) There is thus nothing to respondents' argument that the federal claims are not properly before this Court.[1]

B. The Decision of the S.J.C. Discriminates Among Religious Adherents in Precisely the Way Described in the Petition

1. On the merits, respondents urge that the S.J.C. did not articulate a rule that operates to discriminate among religious bodies and

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[1] Contrary to respondents' assertion, Opp. 14, petitioners are of course in compliance with this Court's Rule 14.1(g)(i). The petition both specifies the stage in the proceedings in which the federal constitutional claims were raised, Pet. 16, and details the manner in which they were disposed of by the S.J.C. Pet. 16-18.

adherents. They argue that the court below "instead applied a rule of standing that is equally applicable to all churches and charities: viz., that only the Attorney General has standing to bring suit to ensure proper governance." Opp. 18. Indeed, respondents call our description of the S.J.C. opinion, among other things, a "palpable misconstruction," Opp. 11, and even, at one point, "an exercise in deception." Opp. 12.

With all respect, we stand by our description of the S.J.C.'s opinion. That opinion is of course in the appendix for the Members of this Court to read. It does *not* hold "that only the Attorney General has standing to bring suit to ensure proper governance." Opp. 18. Rather, as even respondents ultimately concede, "[t]he court held that" — although petitioners here were *denied* standing — "an individual member of a charity may sue . . . to vindicate a personal right 'such as' the right to vote." Opp. 19.

The S.J.C. did *not* find, as respondents would have it, that petitioners were not "denied any 'personal right' at all." Opp. 21. As the petition demonstrates, petitioners *do* have rights and obligations under the *Manual*, including obligations to oversee both Church officers in the performance of their duties, see Pet. 7, and the Directors' compliance with the By-Laws. *Id.* Petitioners have been unable to discharge these obligations because respondents have deprived them of their rights under the *Manual* to an accounting of Mother Church funds, *id.*, and a functioning Committee on Finance. Pet. 8.

The language from the S.J.C. respondents misleadingly quote in support of their contention that the S.J.C. found petitioners without *any* rights in Church governance actually concludes solely that petitioners have no enforceable rights under "the provisions of the 1892 or the 1898 deeds of trust, or the terms of Eddy's will," Opp. 10 (quoting App. 10a). With respect to the *Manual*, the S.J.C. opinion concludes *only* that petitioners lack the "personal right that directly affects the individual member, such as . . . a right to vote in connection with some aspect of the charity's affairs," that would be required under the decision below to confer standing. App. 9a

And indeed in this Court respondents do not even address the array of rights- and obligation-conferring by-law provisions described in detail in the petition. Pet. 3-9. Rather, they assert only that "individual Church members have no right to vote for the

Directors or other officers of the Church or its Publishing Society, or to participate in their decisions." Opp. 2. But petitioners' point is precisely that they need not be given rights in the form of the right to vote or to participate in the decisionmaking process of the Board or of the Publishing Society in order to have personal rights to *participate in church governance* that may be vindicated in a civil court.[2]

In cases such as *Mitchell* v. *Albanian Orthodox Diocese*, 244 N.E.2d 276, 279 (Mass. 1969), the S.J.C. has permitted church members who have been given a right to vote by church by-laws to proceed with suits alleging that the by-laws have not been complied with. In this case, however, solely because petitioners have been given rights to participate in the governance of the Church *other* than the right to vote, suit was not permitted. Pet. 19. The decision below thus *does* discriminate precisely as described in the petition.

The S.J.C. may in the future find standing based on abridgement of *some* participatory rights in church governance other than the right to vote — rights that the S.J.C. may conclude are encompassed by its reference to "right[s] . . . such as . . . a right to vote." See Pet. 19. But the denial of standing in this very case demonstrates — contrary to respondents' suggestion, Opp. 10 — that the S.J.C.'s language granting standing to those with rights "such as" the right to vote does *not* bring within its sweep all religious adherents with specific, by-law created personal rights to participate in their church's governance.

2. Nor does the decision below represent simply a reiteration of some longstanding conclusion of Massachusetts state law that the Christian Science Board of Directors has "final authority . . . over the affairs of the [Mother] Church" — that is, authority over

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[2] Respondents do cite a "wr[iting]" of Mrs. Eddy, Opp. 3, that provides that "inquiries" relating to infractions of the *Manual* "should be addressed to the Christian Science Board of Directors and not to the Pastor Emeritus," i.e., not to Mrs. Eddy herself. Mary Baker Eddy, *The First Church of Christ Scientist and Miscellany* 223 (1913). This obviously has nothing whatever to do with the specific By-Law provisions that explicitly regulate Church governance. See, *e.g.*, *Manual* Art. I. § 9 (Church members obligated to bring complaints of By-Law infringement by the Directors to the Church *Clerk* for adjudication).

interpretation of all *Manual* provisions and of the scope of the participatory rights given members by the *Manual* — and that members "lack any personal interest . . . to sue over governance issues." Opp. 22. The S.J.C. has never before addressed either the rights conferred upon members of The Mother Church by the By-Laws and other foundational documents of the Church, or the scope of the Board of Directors' power to construe those documents.

The cases cited by respondents, Opp. 17, 22, are not to the contrary. Indeed, only one of them, *Krauthoff* v. *Attorney Gen.*, 132 N.E. 865 (Mass. 1921), even *addresses* the standing of any church members to sue over an issue of church governance.[3] And, as described in the petition, Pet. 18 n.13, that case stands only for the unremarkable proposition that where "plaintiffs show no private interest," they will be found to have no standing to pursue their claim. See 132 N.E.2d at 866. *Krauthoff* turned on the inadequacy of the bill of complaint in that case, not upon any assessment of the interests conferred upon Church members by the *Manual* — interests that were not examined by the S.J.C. there at all.

Nor do the other cases cited in the opposition stand for the proposition that the Board of Directors has final authority over interpretation of the provisions of the *Manual*. Indeed, although unreviewable Board authority will be the *effect* of the S.J.C. decision below if it is not reversed, the S.J.C. decision did *not* — despite respondents' wishful description of the opinion — construe the *Manual* to say that "The Christian Science Board of Directors [is] the final religious, administrative, and judicatory body within the Church organization." Opp. 3 (citing App. 4a-5a).

Eustace v. *Dickey*, 132 N.E. 852, 860 (Mass. 1921), described the

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[3] *Eustace* v. *Dickey*, 132 N.E. 852, 864 (Mass. 1921), held only that a single justice was not required to permit Church members to intervene in a suit between Directors and Publishing Society Trustees when they filed their motion "about two months after the reservation of the case for decision by the whole court" and the "case was pending before the full court." *Chase* v. *Dickey*, 99 N.E. 410, 416 (Mass. 1912), did not involve members of the Church at all. It does say that "[a]ll parties who can have an interest in the trust are before the court," but that statement was relevant only to the question before the court of the validity of the residuary clause of Mrs. Eddy's will.

Board as "possessed of authority to control the affairs of the church." But it did not suggest that this authority was comprehensive. Indeed, it went on to say — consistent with the text of the *Manual*, see Pet. 6 — that the "Board of Directors was clothed with extensive powers concerning [the Church's] *management*," *id.* (emphasis added), not the interpretation of the secular legal documents used by Mrs. Eddy to divide powers within the Church government. Similarly, *Dittemore* v. *Dickey*, 144 N.E. 57, 61 (Mass. 1924), held only that the Board of Directors is capable of "hold[ing] . . . property as officers of churches hold property." *Chase* v. *Dickey*, 99 N.E. 410, 411-12 (Mass. 1912), respondents' final case, did not even hold, but merely assumed *arguendo*, that the Board of Directors' "duties are similar to those of deacons or wardens of churches or religious societies."

3. Much of the brief in opposition consists of nothing more than a confusing conflation of the even-handed rule concerning claims of financial mismanagement of public charities with the very different rule articulated by the court below concerning governance violations. See Opp. 18, 19, 20, 23. It is undoubtedly true that, under Massachusetts law, a mere claim of mismanagement of a public charity can be brought only by the Attorney General of the State. And that is, presumably, true with respect to all public charities, including all churches deemed public charities under state law. But that is not the type of claim even arguably raised by Counts I and IV of the complaint, which allege violations of petitioners' rights under the By-Laws contained in the *Manual*. See Pet. 10.

4. Respondents also argue that the decision below would have come out the same way in the other jurisdictions whose decisions were cited in the petition. Opp. 24. They argue that a Texas case and one from North Carolina are distinguishable on the ground that the plaintiff in each had "a trusteeship or official position . . . in the church." Opp. 24. The plaintiff's standing in *Gray* v. *Saint Matthews Cathedral Endowment Fund, Inc.*, 544 S.W.2d 488 (Tex. Civ. App. 1976), however, was explicitly *not* decided on that basis. See *Gray*, 544 S.W.2d at 491 (plaintiff "need not have an interest different from the other parishioners or pewholders"). And the language quoted in the petition from the intermediate appellate court decision in *United Church of God, Inc.* v. *McLendon*, 344 S.E.2d

373, 375 (N.C. Ct. App. 1986), describes the venerable holding of the North Carolina Supreme Court in *Nash* v. *Sutton*, 23 S.E. 178, 179 (N.C. 1895), that "an individual member of a religious society" has an interest in having church property put to the purposes for which it was designed "sufficient to enable him to bring an action to protect the common interests of fellow members," a holding respondents do not even allege has been disturbed.

In any event, respondents cannot make even this weak argument with respect to the other jurisdictions cited in the petition. They rely instead on nothing more than the number of members in each church involved, suggesting that petitioners would not have had standing in those jurisdictions essentially because "[Mother] Church membership is large." Opp. 25.

But, as even the S.J.C. acknowledged, App. 10a, members of The Mother Church are distinct from the general public, and there is, of course, no reason to think that the decisions cited in the petition apply only to *small* churches. Indeed, we can think of few more obviously irrelevant distinctions between the petitioners here and the members of the churches at issue in those other cases.

5. Finally, respondents urge that certiorari should be denied because there can never be a split in authority with regard to the standing of members of The Mother Church. Opp. 23. But this characteristic of the decision below — its finality and its consequence for this entire denomination — clearly argue in this case *in favor of*, not against, a grant of review. See Pet. 26-28.

C. There Can Be No Constitutional Objection Here to This Court's Exercise of Its Certiorari Jurisdiction

Finally, respondents argue that prudential concerns about "entanglement" in the internal affairs of the Church counsel against granting certiorari. But, because Mrs. Eddy intended that members should have recourse to civil courts for resolution of disputes requiring construction of the secular terms of the *Manual*'s By-Laws, these concerns are insubstantial. See Pet. 28-30. Respondents' argument depends entirely on their assertion that "the tribunal vested with final authority to interpret and enforce the *Church Manual* is The Christian Science Board of Directors." Opp. at 26; see also *id.* at 28 (describing the Board of Directors, without citation, as "the body charged by the *Church Manual* with

responsibility for finally resolving all questions of compliance with the *Manual*"). For this proposition, remarkably, respondents offer only what they call an "authoritative" description of "the meaning" of the Church's organizational documents contained in an affidavit filed, no less, by this very Board of Directors — i.e., by respondents themselves. See Opp. 2 n.1.[4]

As the petition demonstrates conclusively, however, and with citation to relevant provisions of the *Church Manual* — provisions that respondents do not even deign to address — that is *not* the structure of governance set up by Mrs. Eddy. The manifestly secular provisions that provide for reports to be given at the Church's annual meeting, and those that describe the tasks to be performed by the Committee on Finance, to give just two examples, were intended — like the very trust documents that created The Mother Church — to be construed by the civil courts in case of dispute. See Pet. 28-29. Indeed, respondents do not deny that Trustees and Directors, *including some of the respondents*, have in the past invoked the civil courts to construe the terms of the *Church Manual*, Pet. 29, something that would be unthinkable were the Directors truly the "highest ecclesiastical tribunal" respondents now claim it to be. Opp. 26. Civil court adjudication on the merits of this case would not abridge the First Amendment. On the contrary, it is a *refusal* to adjudicate this controversy merely because it involves religion that would clearly violate the Constitution.

CONCLUSION

If anything, the brief in opposition reveals that the Board of Directors understands that the S.J.C. decision places in its hands unreviewable ecclesiastical authority within the Christian Science religion. See Opp. 3. This is certainly not what Mrs. Eddy intended, and before the decision of the civil court below permanently alters the structure of her Church, and permanently disadvantages adherents of Christian Science in every jurisdiction, it should be reviewed by this Court.

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[4] The other provisions and decisions on which respondents apparently intend to rely, Opp. 3, on their face do not support respondents' description of the purported interpretive role of the Board of Directors.

Respectfully submitted,

KENNETH A. COHEN
CERISE H. LIM-EPSTEIN
Goodwin, Procter & Hoar, LLP
Exchange Place
Boston, MA 02109
(617) 570-1000

LAURENCE H. TRIBE
Counsel of Record
1575 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

PETER J. RUBIN
2027 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 265-5385

Counsel for Petitioner

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